

Alison K. Hurley, State Bar No. 234042
ahurley@bremerwhyte.com
Courtney M. Serrato, State Bar No. 311141
cserrato@bremerwhyte.com
BREMER WHYTE BROWN & O'MEARA LLP
20320 S.W. Birch Street
Second Floor
Newport Beach, California 92660
Telephone: (949) 221-1000

Attorneys for Defendants,
FRANK FERRARA and CHARLIE FERRARA

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION**

CORY SPENCER, an individual; DIANA
MILENA REED, an individual; and
COASTAL PROTECTION RANGERS,
INC., a California non-profit public
benefit corporation,

Plaintiff,

vs.

LUNADA BAY BOYS; THE
INDIVIDUAL MEMBERS OF THE
LUNADA BAY BOYS, including but not
limited to SANG LEE, BRANT
BLAKEMAN, ALAN JOHNSTON AKA
JALIAN JOHNSTON, MICHAEL RAE
PAPAYANS, ANGELO FERRARA,
FRANK FERRARA, CHARLIE
FERRARA; CITY OF PALOS VERDES
ESTATES; CHIEF OF POLICE JEFF
KEPLEY, in his representative capacity;
and DOES 1-10,

Defendants.

Case No. 2:16-cv-2129

Judge: Hon. S. James Otero
Ctrm: 10C

Magistrate Judge:
Hon. Rozella A. Oliver

**FRANK FERRARA'S AND
CHARLIE FERRARA'S
OPPOSITION TO PLAINTIFFS'
MOTION FOR EVIDENTIARY
SANCTIONS AGAINST
DEFENDANTS CHARLIE
FERRARA, FRANK FERRARA,
AND SANG LEE**

Date: October 12, 2017
Time: 10:00 a.m.
Ctrm: F, 9th Floor

Complaint Filed: March 29, 2016
Trial Date: December 12, 2017

Defendants, Frank Ferrara and Charlie Ferrara (hereinafter, collectively the
"Ferraras"), hereby submit their Memorandum of Points and Authorities in support
of their Opposition to Plaintiffs, Cory Spencer, Diana Milena Reed and Coastal
Protections Ranger, Inc.'s (hereinafter "Plaintiffs"), Motion for Evidentiary
Sanctions Against Charlie Ferrara and Frank Ferrara ("Motion"). The Ferraras also
hereby join in the Opposition to Plaintiffs' Motion filed by Defendant Sang Lee.

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MEMORANDUM OF POINTS AND AUTHORITIES

1. INTRODUCTION

Plaintiffs' Motion, long on inflammatory details about *other* defendants' conduct, fails to establish that either Frank Ferrara or Charlie Ferrara participated in any conduct justifying the relief requested – sanctions that would fully and finally terminate the Ferraras' ability to defend themselves against Plaintiffs' lawsuit. The facts establish that Charlie Ferrara's six text messages with Sang Lee (the only unrecovered text messages cited in support of Plaintiffs' request for relief against Charlie) were not recoverable because Charlie Ferrara traded in the phone they were stored on *before he was under any obligation to preserve it*. The facts establish that Frank Ferrara has produced *every single cellular phone billing record* Plaintiffs have requested of him. The facts establish that no intentional spoliation of any relevant or admissible evidence occurred as a result of either Ferraras' misconduct. The small amount of responsive information not yet produced to Plaintiffs (consisting of a total of fifteen text messages and two months of cellular phone billing records) has been examined at length in depositions, previous discovery motions and meet and confer efforts. There is no evidence these few outstanding discovery items would have any impact whatsoever on the substance of Plaintiffs' claims against any Defendant in this case.

In an effort to cast the Ferraras in a negative light, Plaintiffs begin their motion by intentionally misleading the Court to believe that, had some "missing" information been produced by the Ferraras, Charlie Ferrara and Frank Ferrara would be revealed as participants in a vulgar group text message of March 30, 2016. (Dkt. No. 468-1, at p. 2:8-16.) However, evidence produced by the Ferraras to Plaintiffs nearly three months *before* they filed this motion conclusively establishes that neither Frank nor Charlie was a participant in or recipient of that conversation. Hurley Decl. ¶¶ 3 & 4, Exs. 1 & 2. (Bates Nos. FERRARA00068 & 04233-34.) Throughout the Motion Plaintiffs treat the Ferraras as presumptive participants in communications

1 with the Defendant group at large to suggest some evidence supports Plaintiffs'
2 conclusion that the fifteen text messages and Charlie Ferrara's cell phone billing
3 records contain damning proof of liability. Plaintiffs present no factual support for
4 this notion.

5 The relief requested in Plaintiffs' motion requires this Court to determine that
6 the Ferraras should be found liable for conspiracy based on fifteen unrecoverable text
7 messages and two months of Charlie Ferrara's cell phone billing records (that
8 Plaintiffs acknowledge would contain call and text logs only and not the contents of
9 any communications). Nine total unrecoverable text messages were exchanged
10 between Frank Ferrara and Sang Lee between March 31 and July 29, 2016. Six total
11 unrecoverable text messages were exchanged between Charlie Ferrara and Sang Lee
12 on only two days, June 30, 2016 and July 20, 2016.¹ In contrast, Plaintiffs allege
13 Sang Lee deleted sixteen text messages exchanged with Defendant Alan Johnson on
14 a single day.

15 There is no question that the Ferraras initial responses to Plaintiffs' discovery
16 requests and initial meet and confer efforts did not meet the Court's standards or
17 expectations. However, those issues have been addressed in numerous prior motions
18 and hearings², are essentially resolved, and the issue before the Court today deals
19 with whether or not the Ferraras' will retain any ability to put up a defense to
20 Plaintiffs' claims at trial. Given the status of the Ferraras' production today, their

21
22 ¹ Charlie Ferrara and Frank Ferrara freely admitted in their depositions that they
23 communicated with co-defendant Sang Lee. The Ferraras testified that their
24 communications were on topics such as jobs and cars and generally information
25 unrelated to Plaintiffs' allegations in the Complaint. Mr. Lee further confirmed he
26 did not communicate with the Ferraras regarding the substance of Plaintiffs'
27 Complaint. Hurley Decl., ¶¶ 5-7, Exs. 3-5 (Lee Depo., 294:20-295:25; C. Ferrara
28 Depo., at 47:25-48:15; F. Ferrara Dep. at 275:20-276:21.)

² Counsel for Plaintiffs and Frank and Charlie Ferrara have met and conferred
extensively per the Court's Order on what remaining information Plaintiffs wished to
acquire from Charlie and Frank Ferrara. The scope of all outstanding document
productions by Frank and Charlie Ferrara is memorialized in the Joint Status Report
of September 18, 2017. (Dkt. No. 459.)

1 ongoing efforts to provide additional recoverable information and the absence of any
2 intentional conduct with regard to the small amount of still-missing information, the
3 relief requested by Plaintiff is not justified and must be denied.

4 **2. STATEMENT OF FACTS**

5 **2.1 Plaintiffs' Claim That Either Ferrara Was Aware of Information**
6 **Creating an Early Preservation Obligation Is Speculative**

7 Plaintiffs filed this action on March 29, 2016. (Dkt. No. 1.) On August 29,
8 2016, the Court held a Scheduling Conference, wherein Bremer Whyte Brown &
9 O'Meara LLP appeared representing the Ferraras. (Dkt. No. 120.) Pursuant to the
10 Court's order at the Scheduling Conference, the Ferraras filed their Answers to
11 Plaintiffs' Class Action Complaint on September 2, 2016. (Dkt. No. 120.) Until the
12 Court's Scheduling Conference, the Ferraras were not represented by legal counsel.
13 As laypersons and not lawyers, there is no basis upon which Plaintiffs can
14 demonstrate that either understood or appreciated the complicated preservation
15 obligations Plaintiffs ascribe to them in Plaintiffs' Motion. Plaintiffs have provided
16 no evidence indicating the Ferraras were served with a litigation hold letter at the
17 time of the filing of the action, upon service of Notice of the Scheduling Conference
18 or any other proof a preservation obligation attached before August 29, 2016.

19 While Plaintiffs' motion clearly intends to suggest that Charlie and Frank
20 Ferrara participated in communications potentially supportive of Plaintiff's claims,
21 e.g. the group text chat of March 30, 2016 (Dkt. 468-1, at p. 2:8-16 & fn. 1), the facts
22 definitively establish that neither Frank nor Charlie received, much less participated
23 in, the offensive conversation disingenuously presented as "factual background" to
24 the issues before the Court on this Motion. Frank's AT&T billing records and
25 Charlie's Sprint billing records, which Plaintiffs have had since July 17, 2017 and
26 September 1, 2017, demonstrate that neither of the Ferraras received any incoming
27
28

1 texts from, or sent outgoing texts to, Mr. Mowat on March 30, 2016³. Hurley Decl.
2 ¶¶ 3 & 4, Exs. 1 & 2 (Bates Nos. FERRARA00068 & 04233-34). Plaintiffs'
3 inclusion of this text communication has no purpose in the Motion other than to
4 malign the Court's view of the Ferraras by attributing the bad acts of others to them.⁴

5 Contrary to Plaintiff's assertion that Frank Ferrara had knowledge of this
6 lawsuit as of April 7, 2016, nothing in the Daily Breeze article, cited by Plaintiffs as
7 "proof" of this fact, confirms that Frank Ferrara was aware of the pending lawsuit.
8 Wolff Decl. ¶ 3, Ex. 1. The quotes that can be identified as attributed to Frank
9 Ferrara make no reference whatsoever to any lawsuit. The Article confusingly uses
10 the surname "Ferrara" as shorthand for at least three different people sharing that last
11 name. While the article does indicate someone with the last name Ferrara
12 commented on the lawsuit, there is now way to discern from the text whether that
13 was Frank Ferrara, Angelo Ferrara or someone else entirely. Notably, Charlie
14 Ferrara is not alleged to have had any knowledge of this article by Plaintiffs.
15 Plaintiff's argument that either Ferrara was aware of the allegations against them
16 before August is pure speculation and conjecture. (Dkt. No. 91., Dkt. No. 468-1, at p.
17 3:1-5.)

18
19 ³ The attorneys for Plaintiffs clearly expressed their opinion on the relative value of
20 information included in cellular phone billing records versus extraction reports
21 during the September 12, 2017 status hearing. At that time, Plaintiffs' counsel stated
22 definitively that cellular phone billing records are "better than extraction reports,"
23 explaining: "...the best records in this case would be provided by the phone
24 company." Sept. 12, 2017 Hearing Tr. (Dkt. No. 448) at 18:17 – 19:15 & 23: 6-11.
As both Frank and Charlie Ferrara's cellular phone billing records from their phone
companies show no texts with any of the Defendants on March 30, 2016, it is clear
neither were participants in the referenced text conversation. Hurley Decl. ¶¶ 3 &
4, Exs. 1 & 2.

25 ⁴ Plaintiffs also make the derogatory and unsupported statement in their motion that
26 both Charlie and Frank Ferrara "dodged service throughout the months of July and
27 August." Notably absent from the documents filed in support of the Motion is any
28 evidence this statement is remotely true. Plaintiffs' counsel's sworn statements
supporting this inflammatory accusation are made only on information and belief,
and without citation to any admissible evidence demonstrating personal service
attempts on either of the Ferraras. Wolff Decl., ¶ 7.

1 **2.2. Charlie and Frank Ferrara Have Diligently Worked to Preserve**
2 **and Produce All Available Information Over the Past Several**
3 **Months**

4 The record clearly demonstrates that over the past several months, Frank
5 Ferrara and Charlie Ferrara have made diligent efforts to produce not only all of the
6 information Plaintiffs requested of them in discovery, but also everything they are
7 required to produce under the Federal Rules.⁵ Upon meeting and conferring and
8 attending various hearings on Plaintiffs' discovery motions during the summer of
9 2017, Charlie and Frank Ferrara completed the production of virtually everything
10 Plaintiffs sought from them. (Dkt. Nos. 443, 452, 459, 461.) Pursuant to Court
11 Order, Charlie and Frank Ferrara were required to produce "cell phone imaging and
12 responsive cell phone bills" to Plaintiffs. (Dkt. No. 267.) This production was
13 complete as of September 6, 2017.

14 Plaintiffs and the Ferraras were Ordered to file a Joint Status Report regarding
15 Discovery on September 18, 2017 and identify therein any responsive or relevant
16 documents not yet produced by the Ferraras. (Dkt. Nos. 452 & 459.) All that
17 remained were nine text messages between Frank Ferrara and Sang Lee, six text
18 messages between Charlie Ferrara and Sang Lee and approximately two months of
19 Sprint cell phone billing records for Charlie Ferrara, which have been requested via
20 subpoena by the Ferraras' counsel. (Dkt. No. 459); Hurley Decl. ¶ 17, Ex. 15.
21 Defendants have made a total of eight document productions to Plaintiffs, the most
22 recent of which were duplicates of earlier produced cell phone data recovered from
23
24
25

26 ⁵ While Plaintiffs moving papers lead the Court to believe that Charlie Ferrara made
27 no efforts to obtain his cell phone records, his testimony demonstrates this is not the
28 case. Plaintiffs deposed Charlie Ferrara on July 7, 2017, at which time he testified
that he had made efforts to reach out to Sprint and AT&T, as had his mother. Hurley
Decl. ¶ 6, Ex. 4 (C. Ferrara Depo. at 164:13-166:4.)

1 alternative back-ups.⁶ Hurley Decl. ¶¶ 3, 4 & 9 – 15, Exs. 1, 2 & 8 – 13. As of
2 September 2, 2017, Plaintiffs’ had received extraction reports for both Frank and
3 Charlie Ferrara’s current phones along with a privilege log confirming the only
4 redacted information was privileged attorney-client communication between Bremer
5 Whyte Brown & O’Meara attorneys and clients Frank and Charlie Ferrara. Hurley
6 Decl. ¶¶ 8 & 13, Exs. 6 & 11

7 2.2.1 Frank Ferrara’s Production

8 Frank Ferrara’s Extraction Report including all cellular data (save attorney-
9 client privilege redactions) was produced on September 2, 2017. Hurley Decl. ¶¶ 8
10 & 13, Exs. 6 & 11. For weeks, the parties have been in agreement that the only items
11 missing from Frank Ferrara’s Production of Documents are the contents of the two
12 (2) text messages he sent to and seven (7) he received from Sang Lee in 2016. (Dkt.
13 No. 459, at p. 3:3-12.) Plaintiffs concede in their moving papers that nine text
14 messages form the entirety of the discovery dispute remaining between them, and
15 that all other requested information has been produced. Per the Joint Status Report,
16 the communications occurred on March 31, 2016, April 18, 2016 and July 29, 2016.
17 (Dkt. No. 459, at p. 3:8-10.)

18 2.2.2 Frank Ferrara’s Cell Phone Billing Records

19 As of September 6, 2017, Frank Ferrara has produced all requested cell phone
20 billing records. Hurley Decl. ¶ 14, Ex. 12.) Plaintiffs have thus had in their
21

22
23 ⁶ Charlie and Frank Ferrara have made productions, pursuant to Court Order on the
24 following dates: July 17, 2016, July 21, 2017, July 26, 2017, July 27, 2017,
25 September 1, 2017. However, the productions made by Charlie and Frank Ferrara on
26 September 2, 2017 and September 6, 2017, included already produced document,
27 now un-redacted, and marked “Highly Confidential.” On September 21, 2017, the
28 extraction report of Frank Ferrara’s old, newly recovered phone was produced, but
contained duplicative information as the phone was transferred to Frank’s currently
used cell phone. Hurley Decl. ¶¶ 3, 4 & 9 – 15, Exs. 1, 2 & 8 – 13.

1 possession Frank Ferrara's completed discovery responses since September 6, 2017.⁷

2 2.2.3 Frank Ferrara's Cell Phone Data and Back Ups

3 Frank Ferrara produced his current phone's extraction report to Plaintiffs on
4 September 2, 2017. Hurley Decl. ¶ 13, Ex. 11. It is not in dispute that this report did
5 not include the content of the nine text messages exchanged between Frank Ferrara
6 and Sang Lee. Hundreds of other text messages between Frank and people unrelated
7 to this case around this same time period were also not available for recovery. Frank
8 Ferrara's forensic analyst declares in support of this Opposition that there is no
9 indication of any software or application installed to wipe data from either of the
10 phones. Morales Decl., ¶ 9. There is also no evidence that Frank Ferrara
11 intentionally destroyed any of the nine unrecovered messages. Morales Decl., ¶ 10.

12 It has always been and remains Frank Ferrara's desire to locate and produce
13 the contents of the nine text messages. That desire is rooted not only in Frank
14 Ferrara's wish to comply with his discovery obligations, but also to better support his
15 defense to Plaintiffs' allegation that he conspired in any of the bad acts Plaintiffs
16 allege. It is worth noting that no parties have testified that Frank Ferrara participated
17 in any actions or inactions even potentially supportive of Plaintiffs' claims against
18 him. The nine text messages Frank Ferrara exchanged with Sang Lee form the single
19 thread tenuously connecting Frank Ferrara to Plaintiffs' claimed harm in this case.
20 Given the same, it is in his interest to locate and produce the texts here.

21 Upon determining that the nine texts were not saved on Frank's currently in-

22
23 ⁷ Redacted versions of complete cell records were produced on July 17, 2017.
24 Hurley Decl., ¶ 3, Ex. 1. Copies of the same billing records with redactions removed
25 were produced on September 6, 2017 and marked "Highly Confidential – Attorneys'
26 Eyes Only." The formerly redacted portions of the bills were the only new additions
27 to the billing records previously produced on July 17, 2017. Thus, the September 6,
28 2017 contained no information relevant to any of Plaintiffs' claims. Hurley Decl.,
¶ 14, Ex. 12.

1 use phone, counsel for the Ferraras circled back with the client to see whether the
2 messages could potentially have been backed up or stored elsewhere – e.g. on a
3 remote computer, cloud drive, external hard drive, etc. When it was discovered that
4 Frank still had possession of an older phone (from which he transferred data onto the
5 already extracted phone), it was immediately extracted and produced. While
6 Plaintiffs complain about the timing of that production, it was made on September
7 21, 2017, as early as reasonably practicable, and also in compliance with the Court’s
8 Order that Frank Ferrara and Plaintiffs meet and confer on the status of records
9 produced before September 22, 2017. (Dkt. No. 461); Hurley Decl. ¶ 15, Ex. 13.

10 As Frank’s older, recently located phone contained data that was transferred to
11 the phone Frank currently uses (extracted and produced in July of 2017) it had the
12 potential to include relevant information overwritten on the new device – the nine
13 text messages. While Frank’s hope was that recoverable remnants of the content of
14 nine text messages would remain on the older device, it unfortunately did not.

15 Plaintiffs’ final complaint is that Frank Ferrara’s extraction reports are
16 “improperly redacted.” The only items redacted from the extraction reports
17 produced since September 2, 2017 have been attorney-client privileged
18 communications exchanged between Frank Ferrara and his attorneys at Bremer
19 Whyte Brown & O’Meara, all of which were specifically identified and referenced in
20 a Redaction Index/Privilege log served concurrently with the extraction reports
21 themselves. Hurley Decl. ¶¶ 8 & 24, Exs. 6 & 22. The privilege log and objections
22 specifically identified the precise portions of the extraction reports redacted based on
23 privilege, and the objections were timely asserted immediately upon the discovery of
24 the fact that portions of the extraction reports contained communications between the

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1 Ferraras and their counsel.⁸ Hurley Decl. ¶ 16, Ex. 14.

2 2.2.4 Charlie Ferrara's Production

3 As to Charlie Ferrara, the parties are in agreement that the only items missing
4 from Charlie Ferrara's Production are the contents of the three text messages he sent
5 to and three text messages he received from Sang Lee in 2016⁹ (all of which were
6 stored on a phone he disposed of before any preservation obligation existed), cell
7 phone billing records and call/text detail from the period of December 15, 2015
8 through February 24, 2016, and cell phone device data prior to August 15, 2016.
9 (Dkt. No. 459, at p. 4:6-12.) .

10 2.2.5 Charlie Ferrara's Cell Phone Billing Records

11 As noted in the Joint Status Report, all of Charlie Ferrara's cell phone billing
12 records have been produced to Plaintiffs, with the exception of the short time frame
13 from December 15, 2015 through January 11, 2016. Billing records from January
14 11, 2016 through February 24, 2016 have been produced, but omit a list of text
15 messages sent or received.

16 Counsel for Charlie Ferrara has been working diligently to recover these
17 documents, making a legal demand from Sprint to retain the above cell phone
18

19 ⁸ The omission of an objection of privilege to an initial discovery response is not a
20 "per se" waiver of that objection. *Coalition for a Sustainable Delta v. Koch*, 2009
21 LEXIS 100728, at *7-8, Case No. 1:08-CV-00397 OWW GSA (E.D. Cal. Oct. 15
22 2009). The *Koch* Court went on to note that "[n]either Rule 26(b)(5) nor Rule 34(b)
23 mandate waiver upon a party's failure to object," at the time of an initial, written
24 discovery response. Counsel for Frank Ferrara and Plaintiffs have been engaged in
25 an ongoing meet and confer discussion on this matter for the past several weeks with
26 the hope the issue will be resolved by the time of the hearing. However, should it
27 remain outstanding, counsel for the Ferraras is prepared to submit unredacted
28 extraction reports to the Court for an *in camera* review to demonstrate the redacted
documents contain only attorney-client communications that are protected from
disclosure.

⁹ Plaintiffs misleadingly claim that Charlie Ferrara and Sang Lee have exchanged
seven unrecovered text messages, when in reality, only six are at issue. The
communication on July 19, 2016 between Charlie Ferrara and Sang Lee was not a
text message, but a phone call. Wolff Decl. ¶36 at 17:13-14; Hurley Decl. ¶ 18, Ex.
16 (Bates No. FERRARA04307).

1 records and we are awaiting production of the same. (Dkt. No. 459, p. 4:13-25);
2 Hurley Decl. ¶ 17, Ex. 15. Counsel for Charlie Ferrara has continued to follow up
3 multiple times requesting the status of the production, an estimated timeframe on
4 when to expect the documents, as well to request that Sprint process the request as
5 quickly as possible. Id. Sprint has responded that the request is in process and no
6 estimated time frame for completion could be given, but that documents will be sent
7 as soon as they are located. Id. Charlie Ferrara too has a desire to produce all
8 documents in his possession in order to comply with his discovery obligations, and to
9 also support his defense to Plaintiffs' allegation that he conspired in any of the bad
10 acts Plaintiffs allege. However, the information contained in these cell phone billing
11 records will not contain the content of any text messages.

12 2.2.6 Charlie Ferrara's Cellular Phone Data

13 An extraction report containing data on Charlie Ferrara's cell phone prior to
14 August 15, 2016 was not recoverable because Charlie Ferrara disposed of the cell
15 phone before he was aware of his obligation to preserve it for collection in this case.
16 (Dkt. No. 459, at p. 4:26-5:6.) Charlie Ferrara changed service providers from Sprint
17 to AT&T on August 15, 2016.¹⁰ (Dkt. No. 459, at pp. 4:26-5:6.) Notably, Charlie
18 Ferrara also did not appear with counsel in the lawsuit until August 29, 2016. (Dkt.
19 No. 120, Dkt. No. 459, at p. 5:4-5.) This pre-preservation time frame covers the time
20 data relating to all six text messages with Sang Lee were generated, on June 30, 2016
21 and July 20, 2016. (Dkt. No. 459, at p. 6:1-7.)

22 _____
23 ¹⁰ Plaintiffs note that Charlie Ferrara testified in his deposition that he believed he
24 transferred over all of his data to his new phone at that time, but facts available to
25 date have shown Charlie was mistaken as his extraction report does not include data
26 from the prior phone. It is also important to note that Charlie Ferrara testified at his
27 deposition that he suffered a serious brain injury in 2012, which required him to
28 undergo six months of cognitive therapy and that he is not at all sophisticated in
dealing with computers or electronics. Hurley Decl. ¶ 6, Ex. 4 (C. Ferrara Depo. at
p. 26:3-17; 46:15-47: 3.)

1 Upon determining that the six texts were not available, due to Charlie not
2 having a cell phone to extract, counsel for the Ferraras inquired with the client on
3 whether these messages could potentially have been backed up or stored elsewhere—
4 e.g. on a remote computer, cloud drive, external hard drive, etc., and a search for the
5 same was performed. No back up of the phone existed and as a result, none of the
6 six texts' contents were recovered. Hurley Decl., ¶ 19 Ex. 17.

7 The six text messages Charlie Ferrara exchanged with Sang Lee also form the
8 only basis for Plaintiffs contention that Charlie Ferrara was connected to Plaintiffs'
9 claimed harm in this case. Charlie Ferrara testified that the communications included
10 nothing relating to more than discussing work, and had absolutely nothing to do with
11 Plaintiffs' allegations. Charlie Ferrara's status as a Defendant in this case is
12 premised on Plaintiff Diana Reed mistakenly identifying him as a person who spoke
13 offensively to her at Lunada Bay on a potentially illegally obtained audio recording.
14 However indisputable facts have since demonstrated that the speaker was not Charlie
15 Ferrara, but rather his cousin Leo Ferrara who has admitted under oath to the same.
16 Hurley Decl. ¶¶ 6, 20 & 21, Exs. 4, 18 & 19 (C. Ferrara Depo., at p. 137:3 – 139:12;
17 Decl. of A. Ferrara (Bates Nos. FERRARA00001-2); N.F. Depo., at p 141:25 –
18 143:9.) No other parties have testified that Charlie Ferrara participated in any
19 actions or inactions even potentially supportive of Plaintiffs' claims, and with respect
20 to the evidence presented by Plaintiff. Without the requested adverse inference,
21 nothing ties Charlie Ferrara to this case as a viable defendant.

22 **2.3 Charlie And Frank Ferrara Have Not Made Voluminous Late** 23 **Productions of Previously Unproduced Records**

24 Plaintiffs' contention that the matters before the Court at this hearing involve
25 thousands of pages of *newly produced* cell phone billing records and reports with
26 *new* information, this is simply not the case. Hurley Decl., at ¶¶ 15 & 19, Ex. 13.
27 Plaintiffs statement that "of the total of 10,969 pages produced in this case by Charlie
28 and Frank Ferrara, 8,813 pages were produced *on or after* the day Defendants filed

1 motions for summary judgment . . .” misleads the court as to the content of Charlie
2 and Frank Ferrara’s post-July 2017 productions. Virtually all of the 8,813 pages
3 were duplicates of documents produced to Plaintiffs in July.¹¹

4 2.3.1 Post-July 2017 Productions Are Largely Duplicative

5 Frank Ferrara produced cell phone records and an extraction report in July of
6 2017, redacting only privileged communications, but nevertheless covering the time
7 frame during which Frank Ferrara exchanged the nine unrecovered text messages
8 with Sang Lee. Frank Ferrara’s unredacted (save attorney client exchanges)
9 extraction report and cell phone records were later produced, on September 2, 2017
10 and September 6, 2017. Hurley Decl. at ¶¶ 13 & 14, Exs. 11 & 12. Neither the
11 original nor unredacted reports included the contents of the nine text messages
12 exchanged with Sang Lee. As of September 6, 2017 Frank has produced all
13 discovery documents requested, none of which contain the contents of the nine text
14 messages or any relevant information not originally produced in July of 2017.

15 Charlie Ferrara has produced all cell phone records requested by Plaintiffs per
16 the Joint Status Report, with the exception of December 15, 2015 through February
17 24, 2016, although diligent efforts have been made in requesting these records from
18 Sprint. (Dkt. No. 459 at p. 4:6-9) Hurley Decl., ¶ 17, Ex. 15. On September 1, 2017
19 Charlie Ferrara’s Sprint cell phone records from January 11, 2016 through August
20 15, 2016, were produced to Plaintiffs and included the requested time period from
21 March 2016 through July 2016. Hurley Decl., ¶ 17, Ex. 15. Additional productions
22 made by Charlie, included his unredacted extraction report on September 2, 2017,
23 which also, as originally reported, contained no new or relevant information to
24 Plaintiffs’ case and which had already been produced to Plaintiffs.

25
26
27 ¹¹ Given the Court’s Order permitting Plaintiffs additional time in which to Oppose
28 the Defendants’ Motions for Summary Judgment, Plaintiffs are in any event not
prejudiced by productions of this primarily duplicative information. (Dkt. No.471.)

1 **2.4 Plaintiffs Cannot Establish Either Ferrara Intentionally Deleted**
2 **Information From Their Cellular Data**

3 The forensic analyst for the Ferraras', who performed extractions of both
4 Charlie and Frank Ferraras' cell phones, declares in support of this Opposition that
5 even data that may have been deleted on the cell phones is still extracted so long as
6 the data is recoverable and has not been overwritten. Morales Decl. ¶ 7. However,
7 data is not overwritten intentionally and is not controlled by the mobile device user.
8 Morales Decl. ¶ 8. Data overwriting instead occurs arbitrarily in order to make
9 space for new data on the phone. Morales Decl. ¶ 8. William T. Kellerman Jr.
10 declares, "[o]ne cannot infer, simply based on a determination that specialized
11 wiping software and/or applications are not present on a user's device, that the user
12 has not attempted to accelerate the overwriting process by some other means" but
13 provides no explanation or basis for the application of that conclusion here. (Decl. of
14 Kellerman in Support of Plaintiffs' Motion For Evidentiary Sanctions, at ¶ 9.) Both
15 Charlie and Frank Ferrara's cell phones have been inspected by their forensic analyst
16 for software that may have been installed to eliminate data and Morales and
17 Kellerman agree no such programs were found. Kellerman Decl. ¶ 9; Morales Decl.
18 ¶ 9. There is also no way to determine whether Frank Ferrara intentionally deleted
19 any of the subject texts. Morales Decl. ¶ 10. As both Charlie and Frank Ferrara
20 deny intentionally deleting any unrecoverable texts, this disputed issue is a question
21 of fact the jury can and should decide at trial.

22 **3. ARGUMENT**

23 Federal Rule of Civil Procedure, Rule 37 instructs that the Court's power to
24 award sanctions is discretionary. The harsh penalties Plaintiffs request the Court
25 levy against the Ferraras here are permitted: "only upon finding that the party acted
26 with the intent to deprive another party of the information's use in the litigation."
27 Fed. R. Civ. P. 37(e)(2). Plaintiffs' have not and cannot show this is the case, and as
28 a result the motion must be denied.

1 **3.1 This Court Has Authority to Deny Plaintiffs' Motion**

2 As Plaintiffs note in their Motion, the party requesting any sanction based on
3 alleged spoliation must prove that the producing party culpably failed to preserve the
4 subject information by a preponderance of the evidence. Dkt. 468-1, at p. 11:20-22,
5 citing *Ramos v. Swatzell*, 2017 Lexis 103014 *16 (C.D.Cal. June 5, 2017) Case No.
6 ED CV 12-1089-BRO; *Leon v. IDX Systems Corp.*, 464 F.3d 951, 959 (9th Cir.
7 2006). Plaintiffs have wholly failed to carry that burden as they have not
8 demonstrated with admissible evidence it is more likely than not:

- 9 • That Charlie Ferrara had an existing duty to preserve his physical phone (and data
10 stored thereon) as of its trade-in on or about August 15, 1016;
11 • That Charlie Ferrara intentionally deleted the contents of any text message with
12 any defendant in this litigation;
13 • That Frank Ferrara intentionally deleted the contents of any text message with any
14 defendant in this litigation; or
15 • That Charlie Ferrara's December 15, 2015 – February 24, 2016 Sprint cellular
16 billing records are unavailable due to the bad faith or intentional misconduct of
17 Charlie Ferrara.

18 There is no evidence (much less proof by a preponderance of the evidence)
19 that either of the Ferraras even breached a preservation duty, much less acted with
20 anything akin to the intent necessary to justify the adverse instructions and factual
21 findings Plaintiffs ask this Court to enter. The Plaintiffs' motion should be denied
22 based on their failure to carry their burden of proof alone, before even reaching the
23 critical question of whether any *relevant* information with the ability to *prejudice*
24 Plaintiffs' case was even impacted by the alleged acts of spoliation – an issue
25 glaringly ignored throughout Plaintiffs' Motion.

26 It is within the Court's discretion to award or not award sanctions.
27 Furthermore, "the decision to impose sanctions . . . is uniquely within the province of
28 a district court, . . . any such decision [must be] made with restraint and discretion."

1 *Salovaara v. Eckert*, 222 F.3d 19, 27 (2d Cir. 2000).¹² “A court’s discretion narrows
2 ‘as the severity of the sanction or remedy it elects increases.’” *Sec. Nat’l Bank v.*
3 *Jones Day*, 800 F.3d 936, 941 (8th Cir. 2015). Plaintiffs could not ask for any more
4 serious penalties than the ones sought here, as an adverse finding of fact and adverse
5 inference as to the content of the unrecovered information are both are tantamount to
6 the entry of Judgment in Plaintiffs’ favor on all of the conspiracy claims. The
7 serious prejudice the Ferraras will face should a sanction establishing the fact of a
8 conspiracy or requiring an adverse inference instruction at trial is not justified by the
9 facts, and in any event Plaintiffs have failed to establish by a preponderance of the
10 evidence that actionable spoliation occurred. *Ramos*, 2017 Lexis 103014 at *16.
11 Based on the facts of this case, the minute amount of information not produced and
12 the applicable law, this Court must deny Plaintiffs’ motion in its entirety.

13 **3.2 The Ferraras Preservation Obligations Began No Earlier than**
14 **Their First Appearance, August 29, 2016**

15 Plaintiffs argue without factual support that the Ferraras’ preservation
16 obligations predate their August 29, 2016 appearance in this action. (Dkt. No. 120.)
17 In furtherance of the same, Plaintiffs point to the date they apparently deposited a
18 Notice of Initial Scheduling Conference with UPS for delivery (notably without
19 requesting confirmation of delivery or signature upon delivery, *see* Dkt. No. 91) and
20 handful of local news stories published shortly after the Complaint was filed.
21 (Motion at p. 10:24-27.) On these bases alone, Plaintiffs speculate that the Ferraras
22

23 ¹² Plaintiffs cite to *Sec. Nat’l Bank of Sioux City v. Abbott Labs.*, 299 F.R.D 595
24 (N.D. IA 2014) for the proposition that “discovery abuse ‘persists because most
25 litigators and a few real trial lawyers—even good ones, like the lawyers in this
26 case—have come to accept it as part of the routine chicanery of federal discovery
27 practice . . . Unless judges impose serious adverse consequences, like court-imposed
28 sanctions, litigators’ conditional reflexes persist.’” Despite the fact that the issue in
Abbott Labs. is distinguishable from the issue before this Court, the Sanction Order in
Abbott Labs was also subsequently reversed in *Sec. Nat’l Bank v. Jones Day*, 800
F.3d 936 (8th Cir. 2015).

1 “...must have been aware of the lawsuit in late March or early April 2016¹³.”

2 As a preliminary matter, counsel’s speculation is not evidence capable of
3 carrying Plaintiffs’ burden of proving that either Ferrara had any duty to preserve
4 anything before they appeared in this action. Fed. R. Evid. 602. Plaintiffs point to
5 the Federal Rules of Civil Procedure 37(e) 2015 Advisory Committee notes as
6 support for their argument that the Ferraras’ obligation to preserve their cellular
7 phone data, ESI, backups of the same, etc. began essentially the day the lawsuit was
8 filed based on limited local media attention to the case. Plaintiffs conclude without
9 any analysis that the Ferraras became aware of the entire scope of their evidence
10 preservation based on a handful of local news stories¹⁴ and before they even retained
11 counsel in the case. The same Advisory Committee note cited by Plaintiffs in
12 support of an immediate preservation obligation goes on to caution that unofficial
13 sources of information about a pending lawsuit provide only limited guidance to a
14 potential litigant about the scope or existence of a preservation obligation. The
15 Committee cautioned: “[i]t is important not to be blinded to this reality [that the
16 scope of information that should be preserved may remain uncertain] by hindsight
17 arising from familiarity with an action as it is actually filed.” Fed. R. Civ. P. 37(e)
18 advisory committee’s notes.

19 **3.3 There is No Evidence that the Unrecovered Text Messages or**
20 **Cellular Billing Records Contain Relevant Information**

21 Plaintiffs’ motion seeks evidentiary sanctions against the Ferraras, including

22 ¹³ Plaintiffs also reference text messages exchanged among the other Defendants, but
23 a review of Frank and Charlie Ferraras’ cell phone billing records reveals they were
party to none of them. Wolff Decl., Ex. 19.

24 ¹⁴ Plaintiffs present no admissible evidence whatsoever suggesting that Charlie
25 Ferrara was aware of any news story or article before his first appearance in the
Action in August of 2016. Charlie Ferrara was not asked whether or when he
26 became aware of the news stories about Plaintiffs’ lawsuit at the time of his
deposition. Hurley Decl., ¶ 6. No facts cited by Plaintiffs demonstrate any
27 preservation obligation placed upon Charlie Ferrara until after he innocently
disposed of the cellular phone containing the six at-issue text messages between
himself and Sang Lee.

1 an adverse inference and finding of fact that the fifteen unrecovered text messages
2 confirm both Ferraras' participation in a conspiracy – although precisely what
3 conspiracy is conspicuously not identified in the Motion. As Plaintiffs present
4 absolutely no evidence that the text messages or cellular phone billing records at
5 issue contained any information **relevant** to the action, the requested sanction is
6 neither justified nor reasonable under the circumstances.

7 3.3.1 In Order for A Spoliation Order to Issue, Plaintiffs Must
8 Establish the Allegedly Missing Information is Both Relevant and
9 Prejudice Based on its Non-Disclosure

10 A party's motive or degree of fault is relevant to what sanction, if any, is
11 imposed based on the non-production of information requested in discovery.
12 Plaintiffs seeking an adverse inference instruction (or harsher sanction – such as the
13 factual finding of the existence of a conspiracy requested here) based on alleged
14 spoliation of evidence must establish each of the following elements: “(1) that the
15 party having control over the evidence had an obligation to preserve it at the time it
16 was destroyed; (2) that the records were destroyed with a “culpable state of mind”
17 and (3) that the evidence was “relevant” to the party's claim or defense such that a
18 reasonable trier of fact could find that it would support that claim or defense.”
19 *Zubulake v. USB Warburg LLC*, 220 F.R.D. 212, 220 (S.D.N.Y. 2003) see also *Apple*
20 *Inc. v. Samsung Electronics Co., Ltd.*, 888 F.Supp.2d 976, 989-90 (N.D.Cal. 2012);

21 When information requested in discovery is not available for reasons other
22 than the bad faith or intentional misconduct of the allegedly spoliating party its
23 “...relevance must be proven by the party seeking the sanctions.” *Reinsdorf v.*
24 *Skechers U.S.A., Inc.*, 296 F.R.D. 604, 627 (C.D. Cal. 2013). In cases where the
25 allegedly spoliating party was, at worst, negligent, the moving party “...must prove
26 **both relevance and prejudice** in order to justify the imposition of a severe sanction
27 like the automatic denial of a summary judgment motion, an adverse inference, and
28 most certainly a conclusive negative determination of a disputed fact. *Id.* at 628.

Charlie's pre-appearance disposal of his old cellular phone (and the resultant

1 loss of the content of the six text messages he exchanged with Sang Lee) does not
2 even rise to the level of negligence under the circumstances. Plaintiffs present no
3 evidence showing that Frank Ferrara removed the content of his nine text messages
4 with Sang Lee from any phone or other storage device with a culpable state of mind.
5 Morales Decl. ¶ 10. The only remaining issue – recovery of a few pages of Charlie
6 Ferrara’s cellular phone billing records from Sprint – is in the process of being
7 remedied by counsel for the Ferraras. Hurley Decl. ¶ 17, Ex. 15.

8 Under these circumstances – where the facts show the absence of any bad faith
9 or willful misconduct by either Ferrara – a spoliation sanction requires a finding that
10 the specific information not preserved *was actually relevant to the claims or*
11 *defenses of the party seeking the subject discovery.* *Reinsdorf*, 296 F.R.D. 604 at
12 626. Plaintiffs’ present no evidence whatsoever that this is true – relying instead on
13 seven lines of text concluding with no explanation that the missing information is
14 relevant. (Dkt. No. 468-1, at p. 13:12-18.)

15 While not fully fleshed out in the Motion, Plaintiffs appear to make the
16 circular argument that the contents of the allegedly missing text messages are
17 relevant based solely on the fact that the contents were not available for production
18 to Plaintiffs. Plaintiffs’ argument is nothing more than the fallacy of *petitio principii*,
19 “...assuming in the premises that which is sought to be proven in the conclusion[.]”
20 See, e.g. *Ross Dress For Less, Inc. v. Makarios-Oregon, LLC*, 210 F.Supp.3d 1259,
21 1270 (D. Or. 2016).

22 A review of Plaintiffs’ moving papers confirms they are devoid of any factual
23 support for the assertion presented as fact that the fifteen total unrecovered text
24 messages contain *any* information relevant to the case. While the text messages are
25 technically responsive to Plaintiffs’ Requests for Production, as they were exchanged
26 with another Defendant in the action, the scope of information a party may request in
27 discovery is far broader than the subset of admissible evidence it is designed to elicit.
28 Without some evidence that the texts contained information relevant to Plaintiffs’

1 claims, Plaintiffs' argument of relevance is based on bare speculation. Indeed, the
2 record is filled with communications between the Defendants discussing benign
3 topics like religion, their families, cars and sports. Benign text conversations relating
4 to the sale of a car or a potential job opening – topics the Ferraras admit to
5 exchanging by text – have nothing to do with Plaintiffs' conspiracy and violence
6 claims or any matters at issue in this case. Plaintiffs make no effort even to show
7 that the contents of Frank and Charlie Ferrara's fifteen total unrecoverable text
8 messages are anything other than harmless chat among friends, while the Ferraras
9 present testimonial evidence supporting that is all they contain.

10 With regard to the cellular phone billing records, it is undisputed that Frank
11 Ferrara has completed his production of all requested cellular phone billing records
12 to Plaintiff. (Dkt.No. 459.) Charlie Ferrara's cellular phone billing records from
13 December 15, 2015 through January 11, 2016 (and text detail from January 11, 2016
14 through February 24, 2016) are the only billing records remaining to be produced¹⁵.
15 While these billing records may demonstrate calls or texts between Charlie Ferrara
16 and other Defendants during a time period relevant to the case, it is indisputable that
17 the contents of the phone calls and text communications will not be in the cellular
18 billing records. As these records themselves could never prove on their own anything
19 more than the existence of communications between Charlie and other people, they
20 could never – without supporting testimony or other admissible evidence – establish
21 as a fact that Charlie participated in a conspiracy or made statements adverse to his
22 defenses therein.

23 Where, as here, the party requesting an adverse inference ruling has admittedly
24 received virtually every piece of information requested of the allegedly spoliating
25 parties (Dkt. No.459) with the exception of a few text messages and two months of
26

27 ¹⁵ Counsel for Charlie Ferrara has been making diligent efforts to obtain these for
28 more than a month, and continues to follow up. Hurley Decl. ¶ 17, Ex. 15.

1 cellular phone billing records, absent a showing via "...extrinsic evidence that the
2 loss of the documents has prejudiced their ability to defend the case, then a lesser
3 sanction than a spoliation charge is sufficient to address any lapse in the discovery
4 efforts..." *Apple Inc.*, 888 F.Supp.2d 976, at 994-95 quoting *Pension Comm. of the*
5 *Univ. of Montreal Pension Plan v. Banc of Am. Sec.*, 685 F.Supp.2d 456, 479LLC
6 (S.D.N.Y. 2010), abrogated on other grounds by *Chin v. Port Auth. of New York &*
7 *New Jersey*, 685 F.3d 135 (2d Cir. 2012). Based on facts established by admissible
8 evidence, Plaintiffs have failed to carry their burden of demonstrating the relevance
9 of the unavailable information. As a result, the motion must be denied.

10 *3.3.2 Only Information Relating to the Individual Claims of the Named*
11 *Plaintiffs is Relevant*

12 This is no longer even a putative Class Action case. (Dkt. No. 225.) This is a
13 case alleging that the two individual Plaintiffs, Diana Milena Reed and Cory
14 Spencer, were assaulted, battered and threatened when they attempted to visit Lunada
15 Bay to surf beginning in late January of 2016. Plaintiff Spencer has testified under
16 oath that he was first harassed at Lunada Bay on January 29, 2016. (Spencer Decl. in
17 Support of Class Cert, Motion, Dkt. No. 159-4, ¶ 8; Hurley Decl., ¶ 12, Ex. 10
18 (Spencer Depo., 120:12-121:16). While Plaintiff Reed testified that she visited
19 Lunada Bay on January 6, 2016¹⁶, the first actionable tortious conduct to which she
20 attests did not occur until January 29, 2016. (Spencer Decl. in Support of Class Cert.
21 Motion, Dkt. No. 159-5, ¶¶ 7-8; Hurley Decl., ¶ 22, Ex. 20, (Reed Depo., 108:22-
22 109:5; 119:25-120:3). Plaintiff California Coastal Protection Rangers, Inc. ("CPR")
23 purports to sue on behalf of all visitors to Lunada Bay. However, during the
24 deposition of its designated corporate representative, CCR was unable to identify a
25 single, specific instance of assault, battery or harassment prior to the incidents

26
27 ¹⁶ Ms. Reed confirmed that she did not interact with any of the Defendants during her
28 January 6, 2016 visit to Lunada Bay. Hurley Decl., ¶ 22, Ex. 20 (Reed Depo.,
119:25-120:3).

1 involving the named Plaintiffs on January 29, 2016. Hurley Decl., at ¶ 23, Ex. 21
2 (Slatten Depo., at pp. 58-60:1-14, p. 172:21-173:11).

3 By way of their Motion, Plaintiffs request the Court “designate as established
4 the fact that a conspiracy exists between and among Defendants Charlie Ferrara,
5 Frank Ferrara, and Sang Lee.” (Dkt. No. 468, at p. 15:17-19.) As this is not a Class
6 Action, Plaintiff’s civil conspiracy allegations necessarily relate only to the
7 commission of bad acts against the named Plaintiffs. Civil conspiracy is a cause of
8 action premised upon California state law. “In California, a cause of action for civil
9 conspiracy cannot stand by itself, but must rest upon the successful allegation of an
10 underlying overt act.” *Harry’s Cocktail Lounge, Inc. v. McMahon*, 1995 LEXIS
11 22858, at *38, Case No. CV 93-3566 JGD (C.D. Cal. Mar. 15, 1995) citing *Barney v.*
12 *Aetna Casualty & Surety Co.*, 185 Cal. App. 3d 966, 981 (1986).)

13 Under California law, to prove civil conspiracy Plaintiff(s) must establish: (1)
14 the formation and operation of the conspiracy, (2) the wrongful act or acts done
15 pursuant thereto, and (3) the damage resulting from such act or acts. *Ahrens v.*
16 *Superior Court*, 197 Cal. App. 3d 1134, 1150 (1988). A cause of action based on
17 conspiracy “...accrues on the date of the commission of the last overt act in
18 pursuance of the conspiracy.” *Wyatt v. Union Mortgage Co.*, 24 Cal.3d 773, 789
19 (1979). Intentional tort causes of action, like the ones supporting the conspiracy
20 claim in this case, only accrue “...when the cause of action is complete with all of its
21 elements.” *Rubenstein v. Doe No. 1*, (2017) 3 Cal.5th 903, 911.

22 Plaintiffs confirm in their own sworn testimony they encountered no
23 harassment or other tortious conduct at Lunada Bay before January 29, 2016. The
24 Ferraras thus could not have conspired to assault, batter or harass either Plaintiff on
25 any date before January 29, 2016 because the conspiracy in this individual tort action
26 is necessarily specific to Plaintiff Spencer or Plaintiff Reed – it can only relate to the
27 underlying overt act against one of them. Without knowledge of the identity of the
28 tort Plaintiff, no conspiracy to commit an overt act against that specific Plaintiff can

1 exist. Thus, communications demonstrating Frank Ferrara's or Charlie Ferrara's
2 participation in any conspiracy to harm the named Plaintiffs necessarily occurred no
3 earlier than the named Plaintiffs' visits to Lunada Bay.

4 The discovery propounded in November of 2016 was served when this was
5 still a putative class action. With the definitive denial of Plaintiffs' Motion for Class
6 Certification in February of this year, the scope of information relevant to Plaintiffs'
7 claims narrowed to include only the named Plaintiffs' individual claims. While
8 cellular phone records and bills dating back to December of 2015 may have
9 potentially contained information relevant to putative class members, as the case
10 currently stands, pre-January 29, 2016 communications – communications that
11 occurred before the first actionable tort alleged by Plaintiff Spencer or Plaintiff Reed
12 could have accrued – by definition have no relevance to this case. Thus, the non-
13 production of records predating January 29, 2016 cannot support any of the sanctions
14 requested by Plaintiffs.

15 **3.4 The Relief Requested Is Not Proportional**

16 Even assuming a moving party is able to present evidence supporting
17 spoliation, the Court is still required to weigh whether the relief requested is
18 proportional to the sanction sought – essentially whether the punishment fits the
19 crime. Here, Plaintiffs' motion all but demands that the Court make a conclusive
20 finding of fact that the Ferraras engaged in a conspiracy with Sang Lee to "attack,[]
21 threaten to kill, assault [and] extort" visitors to Lunada Bay. (Dkt No. 1, ¶ 52.) This
22 is tantamount to seeking the death penalty for the Ferraras' entire defense as it would
23 result in a Judgment against them on the conspiracy claims. The alleged conduct of
24 the Ferraras was at worst a negligent failure to preserve a small amount of
25 information responsive to Plaintiffs' expansive requests for production that were
26 originally premised upon broad class claims since removed from litigation. The
27 actions of the Ferraras cannot under the applicable law result in an immediate
28 Plaintiffs' verdict against the Ferraras which is the practical effect of the request for

1 relief made by Plaintiffs. Fed R. Civ. P. 37(e)(2). The trier of fact must be given the
2 opportunity to receive and evaluate all evidence relating to the content of the
3 unavailable text messages and relevance of Charlie Ferrara's cellular phone billing
4 records to weigh in connection with its ultimate decision on liability in this case.
5 None of the Ferraras' conduct rises to the level justifying any of the sanctions
6 requested in Plaintiffs' Motion, and as a result it must be denied in full/

7 **4. CONCLUSION**

8 For the reasons set forth herein, the Ferraras respectfully request this Court
9 deny Plaintiffs' Motion for Evidentiary Sanctions.

10 Dated: October 5, 2017

BREMER WHYTE BROWN & O'MEARA
LLP

11
12 By: 

13 Alison K. Hurley
14 Courtney M. Serrato
15 Attorneys for Defendants
16 FRANK FERRARA and CHARLIE
17 FERRARA
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PROOF OF SERVICE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is 20320 S.W. Birch Street, Second Floor, Newport Beach, California 92660.

On October 5, 2017, I served the within document(s) described as:

FRANK FERRARA'S AND CHARLIE FERRARA'S OPPOSITION TO PLAINTIFFS' MOTION FOR EVIDENTIARY SANCTIONS AGAINST DEFENDANTS CHARLIE FERRARA, FRANK FERRARA, AND SANG LEE

on the interested parties in this action as stated on the attached mailing list.

☒ (BY MAIL) By placing a true copy of the foregoing document(s) in a sealed envelope addressed as set forth on the attached mailing list. I placed each such envelope for collection and mailing following ordinary business practices. I am readily familiar with this Firm's practice for collection and processing of correspondence for mailing. Under that practice, the correspondence would be deposited with the United States Postal Service on that same day, with postage thereon fully prepaid at Newport Beach, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

☒ (BY ELECTRONIC SERVICE) Complying with Code of Civil Procedure § 1010, I caused such document(s) to be Electronically Filed and Served through the _ for the above-entitled case. Upon completion of transmission of said document(s), a filing receipt is issued to the filing party acknowledging receipt, filing and service by 's system. A copy of the filing receipt page will be maintained with the original document(s) in our office.

Executed on October 5, 2017, at Newport Beach, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Kimberly Macey
(Type or print name)


(Signature)

Cory Spencer v. Lunada Bay Boys et al.,

Case No. 2:16-cv-2129-SJO

BWB&O CLIENT: Frank and Charlie Ferrara
BWB&O FILE NO.: 1178.176

SERVICE LIST

<p>Samantha Wolff, Esq. HANSON BRIDGETT 425 Market Street 26th Floor San Francisco, CA 94105 (415) 777-3200 (415) 541-9366 Fax Attorneys For PLAINTIFF</p> <p>swolff@hansonbridgett.com kfranklin@hansonbridgett.com</p>	<p>Tyson M. Shower, Esq. HANSON BRIDGETT 500 Capitol Mall Suite 1500 Sacramento, CA 95814 (916) 442-3333 (916) 442-2348 Fax Attorneys For PLAINTIFFS</p> <p>tshower@hansonbridgett.com</p>	<p>Victor Otten, Esq. OTTEN LAW, PC 3620 Pacific Coast Highway Suite 100 Torrance, CA 90505 (310) 378-8533 (310) 347-4225 Fax Attorneys For PLAINTIFFS</p> <p>vic@ottenlawpc.com</p>
<p>Jacob Song, Esq. KUTAK ROCK LLP 5 Park Plaza Suite 1500 Irvine, CA 92614 (949) 417-0999 (949) 417-5639 Attorney For CITY OF PALOS VERDES ESTATES and JEFF KEPLEY, in his representative capacity, serves as the Chief of Police Department of Defendant City of Palos Verdes Estates.</p> <p>jacob.song@kutakrock.com</p>	<p>J. Patrick Carey, Esq. LAW OFFICE OF PATRICK CAREY 1230 Rosecrans Avenue Suite 270 Manhattan Beach, CA 90266 (310) 526-2237 (310) 356-3671 Fax Attorney For ALAN JOHNSTON individual member of LUNADA BAY BOYS aka JALIAN JOHNSTON</p> <p>pat@patcareylaw.com</p>	<p>Aaron G. Miller, Esq. THE PHILIPS FIRM 800 Wilshire Boulevard Suite 1550 Los Angeles, CA 90017 (213) 244-9913 (213) 244-9915 Fax Attorneys For ANGELO FERRARA</p> <p>amiller@thephillipsfirm.com</p>
<p>Mark Fields, Esq. LAW OFFICES OF MARK C. FIELDS 333 So. Hope Street Suite 3500 Los Angeles, CA 90071 (213) 617-5225 (213) 629-2420 Fax Attorney For ANGELO FERRARA an individual member of LUNADA BAY BOYS and N.F. an individual member of LUNADA BAY BOYS</p> <p>fields@markfieldslaw.com</p>	<p>Peter R. Haven, Esq. HAVEN LAW 1230 Rosecrans Avenue Suite 300 Manhattan Beach, CA 90266 (310) 272-5353 (213) 477-2137 Fax Attorneys For MICHAEL RAY PAPAYANS</p> <p>peter@havenlaw.com</p>	<p>Dana Alden Fox, Esq. LEWIS BRISBOIS BISGAARD & SMITH, LLP 633 W. 5th Street Suite 4000 Los Angeles, CA 90071 (213) 580-3858 (213) 250-7900 Fax Attorneys For SANG LEE</p> <p>Dana.Fox@lewisbrisbois.com</p>